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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CLEAR-VIEW TECHNOLOGIES, INC., a California Corporation,

Plaintiff,

v.

JOHN H. RASNICK, J. BASIL MATTINGLY, WILL RASNICK and PARKER MATTINGLY, individuals residing in Kentucky; and M&R SOLUTIONS, LLC, a dissolved Kentucky Corporation.

Defendants.

CASE NO. CV13-02744-BLF (PSG)

PLAINTIFF'S NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE AND EXCLUDE DEFENDANTS' EXPERT TESTIMONY, AND FOR ATTORNEYS' FEES UNDER FED. R. CIV. P. 37(C)(1)

Original Filing Date: June 14, 2013
Hearing Date: May 28, 2015 (noticed), but soonest available date requested
Trial Date: June 8, 2015

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 28, 2015, at 2:30 p.m., or sooner if the Court becomes available, in Courtroom 3, 5th Floor of the United States District Court for the Northern District of California, the Honorable Beth Labson Freeman presiding, located at 280 South First Street, San Jose, California 95113, Plaintiff Clear-View Technologies, Inc. ("CVT") will and hereby does move for an Order (a) striking portions of the Rebuttal Expert Witness Report of James A. Turner ("Turner") as set forth herein; (b) striking in whole the embedded report of Earl McCune ("McCune"); (c) precluding Defendants John H. Rasnick, J. Basil Mattingly, Will Rasnick, Parker Mattingly, and M&R Solutions, LLC (collectively "Defendants") from presenting in any way the opinions contained in the McCune Report, including through Turner; (d) precluding Defendants from calling Turner to testify to certain opinions and portions thereof as set forth herein; and (e) directing Defendants to pay CVT's costs, including attorney's fees, in bringing this Motion.

CVT's Motion is based on this Notice of Motion and Motion, the below Memorandum of Points and Authorities, the Declaration of Doug Tilley filed concurrently herewith, all matters of which the Court may take judicial notice, and such other arguments and evidence as may be presented before or at the hearing on CVT's Motion.

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

CVT seeks an order striking so-called "rebuttal" expert reports submitted by Defendants and preventing Defendants from introducing or relying at trial upon hearsay and other improper statements set forth in the same. The first of Defendants' proffered "rebuttal" reports was purportedly authored by a non-testifying engineering expert, is based on impermissible testimonial hearsay from never-disclosed witnesses, far exceeds the scope of authorized rebuttal to CVT's damages report, and was required by this Court's October 30, 2014 scheduling Order to have been produced a month earlier than Defendants did. The other report, by Defendants' testifying damages expert, seeks to smuggle in the engineer's report as a report-within-a-report even though the damages

expert has no absolutely no relevant technical expertise, parrot the findings of the non-testifying engineer, and tell judge and jury exactly how Defendants believe they must find.

In October 2014, this Court ordered the parties to disclose experts and produce reports on all "Issues (including claims, affirmative defenses, and counterclaims) on Which Disclosing Party Bears the Burden of Proof" by February 17, 2015. (Dkt. No. 111.) Defendants assert counterclaims premised expressly on their belief that "CVT failed to bring a viable product into the market, thereby breaching its agreement relating to the distribution agreement with Defendant and interfering with same." But rather than disclose a technical expert in support of their counterclaims as required by the Court, Defendants remained silent. Then, after CVT disclosed its damages expert on February 17, 2015, Defendants sprang their latest trap: just weeks before the expert discovery cutoff scheduled for April 14, 2015, Defendants produced the report of supposed technical expert Earl McCune ("McCune"), hidden away as an exhibit to the rebuttal damages report of proposed expert James Turner ("Turner"). The McCune Report is dedicated exclusively to his belief that a single technological aspect of CVT's product, The BarMaster, was "insufficiently supported to function as claimed" and thus "fatally flawed." This, the argument goes, is what crippled a company valued at nearly $90 million dollars, not Defendants' well-documented conspiracy to gut the company from within and starve it from without. Defendants' damages expert, an accountant with no relevant technical expertise, then parrots McCune's supposed finding throughout his own Report, along with impermissible factual and legal conclusions intended to tell judge and jury how to do their jobs. Because they have confirmed that McCune will not testify at trial, Defendants apparently believe that an accountant may regurgitate on the witness stand the technical findings of an engineer, as well as the testimonial hearsay of undisclosed laypersons on which the engineer's report purportedly is based. The law, however, is crystal clear that Defendants may not do what they seek to do.

The Court should strike the McCune Report in full and prevent Defendants from seeking to present or rely upon McCune's supposed findings in any way, including through their mouthpiece expert Turner. *See, e.g.*, *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) (Posner, J.) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty.")

First, McCune's disclosure and report plainly are untimely. This Court ordered the parties to disclose all affirmative experts and reports regarding issues on which such party bears the burden of proof by February 17, 2015. Defendants' contract and covenant counterclaims hinge expressly on their belief that "CVT failed to bring a viable product into the market[.]" As McCune's report is dedicated exclusively to the viability of CVT's product, Defendants were obliged to disclose him 42 days ago. Yet Defendants elected not to, even after stating in September 2014 that they would offer initial expert testimony on this very topic.

Second, the McCune Report far exceeds the scope of authorized rebuttal. Notwithstanding the fact that CVT's damages expert (an economist) offers absolutely no opinion regarding any technological aspect of The BarMaster, that is the one and only thing McCune discusses. Further, McCune does not so much as allude to any opinion rendered by CVT's expert, or even identify any aspect of CVT's expert report as a fact or datum McCune considered in forming his opinions.

Defendants' motive for waiting to disclose McCune's opinions is clear: they hope to force CVT to proceed to trial with no expert or opportunity to rebut McCune's spurious conclusions. Courts routinely strike rebuttal reports and exclude rebuttal testimony in situations like this. *See, e.g.*, *Vu v. McNeil-PPC, Inc.*, 2010 U.S. Dist. LEXIS 53639, *8 (C.D. Cal. May 7, 2010) ("as a result of [Defendants'] belated disclosure, Plaintiffs are prevented from rebutting any of [Defendants'] expert opinions dealing with matters outside the scope of [Plaintiff's expert] report because the deadline for disclosing rebuttal experts has passed. This is a hornbook example of sandbagging, a litigation tactic this Court will not tolerate.").

Third, Defendants cannot show that their untimely disclosure of McCune was either substantially justified or harmless, so as to avoid "automatic and mandatory" exclusion under Fed. R. Civ. P. 37(c)(1). *Vu*, 2010 U.S. Dist. LEXIS 53639 at *11. Defendants stated in September 2014 that they would offer initial expert testimony on the technical viability of The BarMaster, yet decided not to in order to gain an unfair advantage. Hopes of manipulating the rules cannot substantially justify the means employed to reach that end. The harm to CVT is clear as day: Defendants' chicanery leaves CVT with no opportunity to rebut or contradict McCune's findings.

Fourth, McCune's opinions rest heavily on inadmissible hearsay from third parties whom Defendants never identified in discovery or initial disclosures. Because Defendants seek to use these undisclosed third parties' statements affirmatively rather than "solely for impeachment," Fed. R. Civ. P. 37(c)(1) prohibits Defendants from relying on them at trial. Defendants cannot show that their strategic declination to disclose crucial witnesses—whom CVT would have deposed in fact discovery had Defendants indicated any intent to rely upon them—is substantially justified or harmless. Nor may Defendants seek to present this inadmissible hearsay because they cannot show that its probative value, if any, "substantially outweighs their prejudicial effect." Fed. R. Evid. 703; *see Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) ("a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.").

Accordingly, the McCune Report must be stricken in full, and Defendants barred from calling McCune at trial or otherwise seeking to present his purported opinions at trial.

Even if some portion of McCune's improper report could stand, the law would still prohibit Defendants' "mouthpiece" damages expert Turner from giving voice to it. *See, e.g.*, *Dura Auto. Sys*, 285 F.3d at 614 (Posner, J.); *In re Imperial Credit Indus., Inc. Sec. Litig*., 252 F. Supp. 2d 1005, 1012-13 (C.D. Cal. 2003) (precluding an expert from relying upon a non-testifying expert's opinions generated for litigation). Turner, a certified public accountant, has precisely zero qualification to state whether, to what extent, or why McCune's purported technical findings and methodology are or are not sound. *See, e.g.*, *Goben v. Wal-Mart Stores, Inc.*, 2014 U.S. Dist. LEXIS 81442, *5 (D. Nev. June 16, 2014) ("Because Orchard is unable to state the principles and methods used to create the report that he relied on, testimony based on the report's contents cannot satisfy the requirements of Fed. R. Evid. 702."). All portions of Turner's report relying on or referring to McCune's findings must therefore be stricken.

The Court should also strike from Turner's report all improper arguments and ultimate conclusions of fact and law. Rather than limit himself to contradicting or rebutting the opinions of CVT's damages expert, Turner proposes to tell both judge and jury exactly what they need to do: determine that CVT's expert's "incredible" opinions are based in "junk science" and have "no

evidentiary value" because CVT is a "Ponzi scheme" that "does not have a working product, fatally flawed technology, poor management, no patents, and has never made a bonafide [sic] sale from inception in 2006 through June of 2011." In fact, Turner dedicates an entire section of his report to what he calls "CVT's Failure to Mitigate Alleged Damages." But the law makes plain that the jury, not Turner and not Defendants, must decide what CVT was and why it went from being worth tens of millions of dollars to virtually nothing.

CVT respectfully requests that the Court strike the reports of McCune and Turner as set forth herein, preclude Defendants from introducing or relying at trial upon any stricken findings, and direct Defendants to pay CVT's costs and fees in bringing this Motion.

I. FACTUAL BACKGROUND

A. CVT's Claims and Defendants' Counterclaims

This action arises out of Defendants' well-documented conspiracy with avaricious CVT insiders to divert CVT's intellectual property, personnel, and investor base from CVT to a competing entity, dubbed "Skunk Works," through which Defendants would commercialize a knock-off of CVT's revolutionary product The BarMaster. On June 13, 2013, CVT filed its Complaint in this action. (Dkt. No. 1.) On March 19, 2014, CVT filed its First Amended Complaint, asserting, *inter alia*, a claim for Defendants' breach of a distribution agreement between CVT and Defendant M&R Solutions, LLC, in which each individual Defendant participated. (Dkt. No. 37, the "FAC.")

Defendants answered the FAC on April 7, 2014. (Dkt. No. 39.) On May 28, 2014, Defendants sought leave to amend their Answer to assert counterclaims seeking relief for CVT's alleged breach of the parties' distribution agreement and associated covenants. (Dkt. No. 52.) Defendants' proposed First Amended Answer alleged that CVT breached the distribution agreement "by failing to manufacture or cause to be manufactured, promote and sell the product, and to develop into a successful production for distribution." (Dkt. No. 53-3.) Defendants' interrogatory responses confirm that their affirmative claims hinge on their assertion that "CVT failed to bring a viable product into the market, thereby breaching its agreement relating to the distribution agreement with Defendant and interfering with same." (Tilley Decl., ¶ 6, Ex. A.)

This Court granted Defendants' motion for leave to amend on September 3, 2014, and Defendants' filed their First Amended Answer on September 15, 2014. (Dkt. Nos. 75, 79.)

B. The Case Calendar and Expert Disclosure Deadlines

On January 8, 2014, former presiding Judge Davila set an August 1, 2014 deadline for "Designation of Opening Experts with Reports[,]" as well as an August 29, 2014 deadline for "Designation of Rebuttal Experts with Reports[.]" (Dkt. No. 26.) These deadlines remained in effect following reassignment of this case to the Hon. Beth Labson Freeman. (*See* April 17, 2014 Order Reassigning Case at ¶ 5.) This Court held a Case Management Conference on May 14, 2014, reset certain deadlines, and directed the parties to "meet, confer and submit a proposed stipulation setting discovery cut-off dates[,]" including in regards to expert witnesses. (Dkt. No. 50.) On May 30, 2014, the parties submitted a stipulated case calendar that, among other things, set (a) a November 7, 2014 "Fact Discovery Cutoff[;]" (b) a September 12, 2014 deadline for the parties to exchange "Initial Disclosure[s] of Topics on which Parties Intend to Offer Expert Testimony[;]" (c) an October 3, 2014 deadline for "Supplemental Disclosure of Topics on which Parties Intend to Offer Expert Testimony[;]" (d) a January 21, 2015 deadline to "Disclose Initial Experts, Exchange Initial Reports on Issues (including claims, affirmative defenses, and, if permitted by the Court, counterclaims) on Which Disclosing Party Bears the Burden of Proof[,]" and (e) a February 9, 2015 deadline to "Disclose Rebuttal Experts, Exchange Rebuttal Reports[.]" (Dkt. No. 55.) The Court entered the parties' stipulated case calendar on June 2, 2014. (Dkt. No. 56.)

On September 9, 2014, in response to CVT's Motion to Compel (Dkt. No. 62) and in light of substantial evidence of spoliation by Defendants, Magistrate Judge Paul S. Grewal, to whom all discovery matters were referred, directed that Defendants submit their media to a court-appointed examiner for forensic investigation into the nature and extent of Defendants' discovery misconduct. (Dkt. No. 76.) Under Judge Grewal's Order, the parties were to meet, confer, and submit a joint plan regarding a plan for forensic examination by September 23, 2014. (*Id.*) Following serial delays and bad faith negotiations by Defendants, which required that CVT repeatedly request judicial intervention in enforcing the Court's Orders (*see* Dkt. Nos. 80, 89, 92, 96, 101), Judge Grewal entered a forensic examination plan on October 21, 2014—just over two weeks prior to the

November 7, 2014 fact discovery cutoff. (Dkt. No. 103, adopting and entering stipulated forensic examination plan.) The Court-approved forensic inspection plan called for the independent forensic examiner to issue its findings regarding Defendants' media by December 18, 2014.

In light of the looming November 7, 2014 fact discovery deadline, the forensic examination schedule, and Defendants' October 17, 2014 statement that they intended to notice and take 19 third party depositions across the country, on October 24, 2014, CVT moved this Court to modify the case calendar so that Defendants' spoliated documents could be forensically recovered and produced to CVT before Defendants and third parties were deposed. (Dkt. No. 105.) This Court granted CVT's request on October 30, 2014. (Dkt. No. 111.) As relevant to the instant Motion, the Court set a February 17, 2015 deadline to "Disclose Initial Experts, Exchange Initial Reports on Issues (including claims, affirmative defenses, and counterclaims) on Which Disclosing Party Bears the Burden of Proof[,]" as well as a March 17, 2015 deadline to "Disclose Rebuttal Experts, Exchange Rebuttal Reports[.]" (*Id.*, incorporating by reference Dkt. No. 105-6 at 2.)

C. The Parties' Topic Disclosures

Pursuant to the Court's Scheduling Order (Dkt. No. 56), on September 12, 2014, the parties exchanged lists of topics on which they intended to offer expert testimony. CVT stated that it "may offer expert testimony regarding the following topics: 1. Damages, including but not limited to company valuation; 2. Technology and start-up companies; 3. Document preservation and search practices; and 4. Spoliation." (Tilley Decl., ¶ 8.) Defendants identified the following "topic[s] of Defendants' intended expert testimony… 2. Status of the BarMaster product during the relevant time period, including assessment of feasibility for mass production for purposes of distribution and sales[.]" (*Id.* at ¶ 9, Ex. B.) Neither party identified particular experts or provided reports.

On October 3, 2014, CVT advised that it "may offer rebuttal expert testimony regarding the topics disclosed [by Defendants], including but not limited to the '[s]tatus of the BarMaster product during the relevant time period, including assessment of feasibility for mass production and sales.'" (*Id.* at ¶ 10.) Defendants disclosed no additional topics. (*Id.*)

D. The Parties' Expert Disclosures

On February 17, 2015, CVT timely disclosed Dr. Jonathan Neuberger as its damages expert, stated that it would rely on Dr. Neuberger at trial, and provided Dr. Neuberger's report as required by Fed. R. Civ. P. 26(a)(2)(D). (Tilley Decl., ¶ 11, Ex. C, (the "Neuberger Report").) The Neuberger Report set forth Dr. Neuberger's quantification of the harm wrought upon CVT by Defendants' unlawful conduct, based on information produced in this litigation as well as his own independent analysis. (*Id.*) The Neuberger Report contained no technological analysis of any aspect of The BarMaster product, as Dr. Neuberger is not a technical expert. (*Id.*)

Defendants "state[d] that they do not presently intend to offer the testimony of any expert witness[,]" and "reserve[d] the right to submit a rebuttal expert witness list no later than March 17, 2015 pursuant to Federal Rules of Civil Procedure – Rule 26(a)(2)(D)(ii) and the *Order Granting Plaintiff's Motion to Stay Fact Discovery and Modify Case Management Schedule*[.]" (Tilley Decl., ¶ 12 (italics in Defendants' disclosure).)

On March 17, 2015, Defendants served the "Rebuttal Expert Witness Report of James A. Turner, MBA, CPA." (Tilley Decl., ¶ 13, Ex. D (the "Turner Report").) As set forth in his Report, Turner was engaged "to review and comment in the capacity of a rebuttal expert on the subject matter set forth in plaintiff's Expert Witness Report of Jonathan A. Neuberger[.]" (*Id.* at ¶ 1, citing Fed. R. Civ. P. 26(a)(2)(D)(ii).) In seeking to rebut Dr. Neuberger's opinions, Turner argues that Dr. Neuberger failed to account for "technology risks," namely, that "the BarMaster is 'fatally flawed.'" (Turner Report at 14, 17.) Because he does not claim any relevant technological expertise or qualifications, Turner adopts in full the findings of a second report proffered by Defendants—the report of Earl McCune, attached as Exhibit 2 to the Turner Report. (Turner Report at Exhibit 2 (the "McCune Report").) The Turner Report describes McCune as a "[t]echnology consultant" to Turner (Turner Report at ii), while the McCune Report states that McCune was retained by defense counsel. (McCune Report at ¶ 3.) The McCune Report does not mention Dr. Neuberger or any opinion rendered by him, and does not identify the Neuberger Report as a fact or data relied upon by McCune in rendering his opinions.

The McCune Report is dedicated solely to the purported viability of The BarMaster and focuses exclusively on radio frequency identification, a single component of The BarMaster

technology. (McCune Report, ¶ 4.) Dr. McCune states that "[he] did not evaluate" and other aspect of The BarMaster. (*Id.*) The McCune Report is based upon Dr. McCune's (a) review of a single promotional BarMaster video posted on YouTube; (b) review of five photographs which he understands to depict limited aspects of The BarMaster technology; (c) review of patent application histories, and (d) interviews with Defendant Parker Mattingly as well as third parties James Bryon Wyatt, David Cano, and Hugh Simpson. (*Id.* at ¶ 6, Figs. 1 and 2, and Exs. B, C, D.) Neither Wyatt nor Cano appears on any party's initial disclosures under Fed. R. Civ. P. 26(a)(1), nor has been identified by either party in discovery responses or otherwise as potentially relevant to this litigation. (Tilley Decl., ¶¶ 2, 3, 6.) Defendants have not identified Simpson, Wyatt, or Cano as a "person with knowledge regarding [the] facts" underpinning Defendants' claims that The BarMaster was not viable. (*Id.* at ¶ 6, Ex. A.) Neither Wyatt, Cano, nor Simpson was deposed in this action or provided any declaration, affidavit, or other sworn statement. (*Id.* at ¶ 7.)

E. CVT's Efforts to Resolves The Parties' Dispute

On March 26, 2015, counsel for CVT wrote counsel for Defendants, stating that the McCune Report and portions of the Turner Report are improper under the Federal Rules in several materials respects and requesting that Defendants withdraw the same in order to avoid unnecessary motion practice. (*Id.* at ¶ 15, Ex. E.) On March 30, 2015, defense counsel confirmed that while "Mr. McCune will not be called to testify at the trial of this matter[, n]o portions of Mr. McCune's report will be withdrawn." Mr. Crosby further advised that "[n]o portions of Mr. Turner's report will be withdrawn." (*Id.*)

II. LEGAL STANDARDS

A. Purpose and Scope of Expert Opinion Evidence

In recognition that litigation may present questions about which the average fact finder lacks knowledge, Federal Rule of Evidence 702 authorizes a party to present expert opinion testimony when the proffered expert has "knowledge, skill, experience, training, or education" that "will help the trier of fact to understand or to determine a fact in issue[.]" The "central concern" of Rule 702 is that expert testimony be "helpful[]" to the jury. *United States v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. Cal. 1993); *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

The Court must act as "gatekeeper" to ensure that expert testimony is sufficiently reliable to assist the factfinder. The Supreme Court has suggested several factors to guide the Court's inquiry: "1) whether a theory or technique can be tested; 2) whether it has been subjected to peer review and publication; 3) the known or potential error rate of the theory or technique; and 4) whether the theory or technique enjoys general acceptance within the relevant scientific community." *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (citing *Daubert*, 509 U.S. at 592-94)

The Court must also be vigilant in prohibiting experts from invading the province of the judge or jury. While expert opinion is not *per se* objectionable "just because it embraces an ultimate issue" to be decided, Fed. R. Evid. 704, an expert may not opine on legal conclusions, that is, give "an opinion on an ultimate issue of law." *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1063 (9th Cir. 2002), overruled on other grounds by *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 467 (9th Cir. 2014). Nor may an expert opine on an ultimate issue of fact, for in doing so the expert substitutes his judgment for that of the finder of fact. *See, e.g.*, *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) ("When an expert undertakes to tell the jury what result to reach, this does not aid the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's.").

B. Expert Disclosures Procedure

Federal Rule of Civil Procedure 26(a)(2)(A) requires that a party "must" disclose the identity of any expert witness "it may use at trial[.]" Rule 26(a)(2)(D)(ii) permits the admission of rebuttal expert evidence, where such evidence is "intended solely to contradict or rebut evidence on the same subject matter identified" by an initial expert witness. Any expert disclosure must be made "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D)(i).

Rule 37(c)(1) provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) … the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Exclusion of expert evidence "is automatic and mandatory unless the party can show the violation is either justified or harmless." *Vu v. McNeil-PPC, Inc.*, 2010 U.S. Dist. LEXIS 53639, *11 (C.D. Cal. May 7, 2010); *see also Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (Rule 37 "gives teeth to [the disclosure] requirements by forbidding the use at trial of

any information required to be disclosed by Rule 26(a) that is not properly disclosed."); 1993 Adv. Comm. Notes to Fed. R. Civ. P. 37(c) (exclusion for violation of Rule 26 is "automatic" and "self-executing[.]").

The party who violates Rule 26 bears the burden of showing substantial justification or harmlessness. *See Yeti*, 259 F.3d at 1106. In determining whether such a party has met its burden, courts consider: (i) prejudice or surprise to the party against whom the evidence is offered; (ii) the ability of that party to cure the prejudice; (iii) the likelihood of disruption of the trial; and (iv) bad faith or willfulness involved in not timely disclosing the evidence. *See Gerawan Farming, Inc. v. Prima Bella Produce, Inc*., 2011 U.S. Dist. LEXIS 52792, *14-15 (E.D. Cal. May 17, 2011). Inadvertent mistakes and unintentional oversights are not substantial justifications for delay. *R & R Sails Inc. v. Insurance Co. Of State of Penn.*, 251 F.R.D. 520, 526 (S.D. Cal. 2008). Courts strike untimely disclosures where, e.g., such disclosure is made after expiration of the fact discovery cutoff, the deadline to disclose rebuttal experts, or the deadline to file dispositive motions. *See, e.g.*, *Vu*, 2010 U.S. Dist. LEXIS 53639 at *11; *R&O Constr. Co. v. Rox Pro Int'l Group, Ltd.*, 2011 U.S. Dist. LEXIS 78032, *5 (D. Nev. July 18, 2011).

1. **Requirements for Rebuttal Expert Disclosures, and the Court's Obligation to Strike for Non-Compliance**

The function of rebuttal expert testimony is to "explain, repel, counteract or disprove evidence of the adverse party." *R&O*, 2011 U.S. Dist. LEXIS 78032 at *5 (collecting cases). Because rebuttal disclosures "are not intended to provide an extension of the expert designation and report production deadline[,]" *Gerawan Farming*, 2011 U.S. Dist. LEXIS 52792 at *9 (citation omitted), the law places firm limits on the scope of rebuttal testimony.

First, a rebuttal expert must directly and specifically contradict the particular opinions set forth by the expert he or she is offered to rebut. *See, e.g.*, *Goben v. Wal-Mart Stores, Inc.*, 2014 U.S. Dist. LEXIS 81442, *8 (D. Nev. June 16, 2014) (precluding testimony for expert's failure to provide "the specificity required of rebuttal reports."). It is insufficient to address the "general subject matter of the case." *Id*. As the Central District of California recently explained:

> In its opposition, Costco argues that because Dr. Kelly opined on Connor's cause of [harm], Costco's Experts are entitled to opine on alternative causes of [harm] because all of these opinions deal with the same subject matter. Costco's argument does not make sense. If the phrase "same subject matter" is read broadly to encompass any possible topic that relates to the subject matter at issue, it will blur the distinction between "affirmative expert" and "rebuttal expert." More importantly, such broad reading of Rule 26(a)(2)(C)(ii) will render the scope of the subject matter limitless and will lead to unjust results, such as the result Costco suggests in its opposition.

Vu, 2010 U.S. Dist. LEXIS 53639 at *6-8. Where a so-called rebuttal report fails to "directly address the findings" of the initial report it is offered to rebut, "it is not a rebuttal expert report within the meaning of Rule 26[.]" *R&O*, 2011 U.S. Dist. LEXIS 78032 at *8; *see Houle v. Jubilee Fisheries, Inc.*, 2006 U.S. Dist. LEXIS 1408, *2 (W.D. Wash. Jan. 5, 2006) (holding that a witness is not a rebuttal expert where his report did not cite, mention, or indicate that he was aware of the previous expert report). Such a report is treated instead as an affirmative expert report and, unless produced by the deadline for submitting initial expert reports, will be stricken as untimely and unfair:

> Here, as a result of Costco's belated disclosure, Plaintiffs are prevented from rebutting any of Costco's expert opinions dealing with matters outside the scope of Dr. Kelly's report because the deadline for disclosing rebuttal experts has passed. This is a hornbook example of sandbagging, a litigation tactic this Court will not tolerate.

Vu, 2010 U.S. Dist. LEXIS 53639 at *8; *see also, e.g.*, *International Business Machines Corp. v. Fasco Indus., Inc.*, 1995 U.S. Dist. LEXIS 22533, *8-9 (N.D. Cal. Mar. 15, 1995) ("two of Fasco's rebuttal experts should have been designated on the initial disclosure date because they plan to opine on subjects that IBM's experts will not address[.]").

Second, because "[a] rebuttal expert report is not the proper place for presenting new arguments[,]" *R&O*, 2011 U.S. Dist. LEXIS 78032 at *15, "rebuttal experts cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts." *IBM*, 1995 U.S. Dist. LEXIS 22533 at *7. Courts strike rebuttal reports and preclude rebuttal testimony that "go beyond the boundaries" of the affirmative report they are intended to rebut. *Vu*, 2010 U.S. Dist. LEXIS 53639, at *6-8; *see also Goben*, 2014 U.S. Dist. LEXIS 81442 at *6-9. Courts similarly exclude so-called rebuttal experts where "the purpose of [their] testimony is to contradict an expected and anticipated portion of the other party's case-in-chief[.]" *Amos v. Makita*

U.S.A., 2011 U.S. Dist. LEXIS 158103,*2 (D. Nev. Jan. 6, 2011) (such a witness "is not a rebuttal witness or anything analogous to one.") (quotation omitted).

III. DEFENDANTS' PROFFERED REBUTTAL EXPERT TESTIMONY IS IMPROPER

A. McCune's Report Must Be Stricken In Whole

The McCune Report—tucked away as an exhibit to the Turner Report—is improper in several respects. Defendants have confirmed that McCune will not testify at trial. McCune's Report must be stricken in whole, and Defendants must be barred from seeking to present his opinions in any way, whether through Turner or otherwise.

1. The McCune Report Must Be Stricken Because McCune Was Not Timely Disclosed and Exceeds the Authorized Scope of Rebuttal

First, McCune's Report is untimely because it speaks exclusively to an issue on which Defendants bear the burden of proof, and thus should have been produced by the Court's deadline for initial expert disclosures. (*See* Dkt. No. 111 (setting deadline for parties to disclose initial experts and produce reports on "Issues (including … affirmative defenses[] and counterclaims) on Which Disclosing Party Bears the Burden of Proof").) Defendants assert counterclaims for breach of the parties' Distribution Agreement and associated covenants on the theory that CVT failed to deliver a functional product. (Dkt. No. 79 at Counterclaims.) Defendants have confirmed in interrogatory responses that their claimed entitlement to relief hinges on their assertion that "CVT failed to bring a viable product into the market, thereby breaching its agreement relating to the distribution agreement with Defendant and interfering with same." (Tilley Decl., ¶ 6.) McCune's Report is dedicated specifically and solely to supporting Defendants' assertion: McCune opines that The BarMaster is "fatally flawed" and "did not address the most rudimentary radio antenna characteristics[;]" that CVT "misunderstood and improperly applied" radio frequency transmission technology[;]" and that as a result, The BarMaster "was insufficiently supported to function as claimed[.]" (McCune Report at Executive Summary of Findings.) Because Defendants bear the burden of proof on all elements of their affirmative claims, the Court's scheduling Order required that Defendants' disclose McCune and serve his Report no later than February 17, 2015. Defendants strategically elected, however, to wait for additional several weeks to disclose McCune, in order to rob CVT of any opportunity to

contradict his opinions. "[A]s a result of [Defendants'] belated disclosure, Plaintiff[is] prevented from rebutting" the opinions in the untimely report "because the deadline for disclosing rebuttal experts has passed. This is a hornbook example of sandbagging, a litigation tactic this Court will not tolerate." *Vu*, 2010 U.S. Dist. LEXIS 53639 at *8.

Second, McCune's Report makes plain that he is not offered as a rebuttal witness. Despite that the law requires rebuttal experts to directly and specifically contradict the particular opinions of an initial expert, the McCune Report does not address in even the most cursory fashion a single fact, assertion, or opinion contained in the Neuberger Report. *See, e.g.*, *Houle*, 2006 U.S. Dist. LEXIS 1408 at *2. In fact, McCune never once mentions Dr. Neuberger, nor does he identify the Neuberger Report as a something he considered in forming his opinions. *See id.*; Fed. R. Civ. P. 26(a)(2)(B)(ii) (requiring expert to state "facts or data considered by the witness in forming" his or her opinions). All the McCune Report does is offer an alternative theory of causation—that some technological failing, rather than Defendants' well-documented conspiracy to cripple CVT, was the cause of CVT's losses. This is plainly improper. *See, e.g.*, *Goben*, 2014 U.S. Dist. LEXIS 81442 at *9 ("Orchard's report goes far beyond simply trying to discredit or explain Cecchi's findings, and instead focuses on an alternative theory of causation."); *IBM*, 1995 U.S. Dist. LEXIS 22533at *7 ("rebuttal experts cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts."). "[CVT] has not designated an expert to opine on [technical] issues, so [McCune has] nothing to rebut[.]" *IBM*, 1995 U.S. Dist. LEXIS 22533at *7. Accordingly, McCune "[may] not testify, period." *Id.*; *accord R&O*, 2011 U.S. Dist. LEXIS 78032 at *8-9 (striking expert reports that exceed the scope of the initial report); *Vu*, 2010 U.S. Dist. LEXIS 53639 at *6 ("Because these experts' opinions go beyond the boundaries of Dr. Kelly's report, Costco's blanket characterization of Drs. Banner and Beckwith as 'rebuttal experts' is disingenuous.").

Third, Defendants cannot show that their untimely disclosure was harmless or substantially justified so as to avoid "automatic and mandatory" exclusion of McCune's opinions. *Vu*, 2010 U.S. Dist. LEXIS 53639 at *11; *see Yeti*, 259 F.3d at 1106 (explaining that the burden of proof rests with the proponent of evidence). The prejudice to CVT is obvious, as are CVT's inability to cure and Defendants' willfulness: because the deadline for disclosing rebuttal experts has lapsed, Defendants

hope to force CVT to proceed to trial—scheduled for two months from today—with no expert to explain and correct the many inaccuracies in McCune's purported findings. *See Vu*, 2010 U.S. Dist. LEXIS 53639 at *8 ("This is a hornbook example of sandbagging, a litigation tactic this Court will not tolerate."); *R&O*, 2011 U.S. Dist. LEXIS 78032 at *10 (finding exclusion-worthy harm due to untimely disclosures even where no trial date is set); *Gerawan Farming*, 2011 U.S. Dist. LEXIS 52792 at *18 ("[D]isobedient conduct not shown to be outside the control of the litigant is all that is required to demonstrate willfulness, bad faith, or fault.") (quotation omitted).

Defendants cannot hope to justify their tardiness on the grounds that, for example, they believed that CVT, as plaintiff, must offer expert opinion regarding technical aspects of The BarMaster. *See R&O*, 2011 U.S. Dist. LEXIS 78032 at *21-22 (rejecting that untimely disclosure was "substantially justified because [plaintiff] bears all burden of proof in this case, and therefore [Defendants] did not believe a primary expert was necessary since [they] merely [are] rebutting R&O's allegations."). What is more, such an argument would only *confirm* Defendants' violations: "courts have found that a defense expert whose testimony is intended to negate an element of the plaintiff's case, generally, must be identified in the initial round of expert disclosures." *Gerawan Farming*, 2011 U.S. Dist. LEXIS 52792 at *11 fn.3 (collecting cases); *see also Amos*, 2011 U.S. Dist. LEXIS 158103 at *2 ("[i]f the purpose of expert testimony is to contradict an expected and anticipated portion of the other party's case-in-chief, then the witness is not a rebuttal witness or anything analogous to one."). Further, any such claim is flatly contradicted by the record. Defendants stated in September 2015 that they intended to offer expert opinion regarding **"[s]tatus of the BarMaster product** during the relevant time period, including assessment of feasibility for mass production for purposes of distribution and sales[,]" and CVT responded in October 2015 that it "may offer **rebuttal** expert testimony regarding the topics disclosed [by Defendants], including but not limited to the '[s]tatus of the BarMaster product during the relevant time period, including assessment of feasibility for mass production and sales." (Tilley Decl., ¶¶ 9, 10 (emphases added).) The Defendants may not rewrite the record now in hopes of saddling CVT with the consequences of their gamesmanlike disclosures.

For the foregoing reasons, the McCune Report must be stricken in whole and Defendants barred from seeking to introduce or rely upon McCune's purported opinions in any manner, including through Turner.

2. **The McCune Report Should Also Be Stricken Because It Relies on Inadmissible Hearsay Whose Probative Value Cannot Outweigh Its Prejudicial Effect**

Other than five photographs, patent file wrappers, and a marketing video, McCune relies exclusively on purported hearsay statements from third parties James Bryon Wyatt, David Cano, and Hugh Simpson as well as Defendant Parker Mattingly. (*See* McCune Report at "List of Discussions.") McCune attributes the following statements to Wyatt or Cano: (i) "original installation instructions for the Back Bar shelf antenna loops were to use 18 gauge (18/2 AWG) pairs of copper wires to the RFID reader[;]" (ii) "the original interconnect to the shelf RFID loops were actually antennas, themselves, so the shelves could not work as intended[;]" (iii) this interconnect had to be replaced with coaxial cable, and that the interconnection (the 'balun') from the coaxial cable to the copper loop antenna had to be redesigned[;]" (iv) RFID communication was problematic but "sometimes OK[;]" (v) that "the mirror behind the Back Bar shelves at '202 Market' caused communications for the RFID[;]" and (vi) "other installers 'did not care' that attaching the defined shelf copper loop antennas to a metal shelf would never work." (McCune Report at 12.) Each of these alleged statements is central to McCune's ultimate conclusion that The BarMaster "is fatally flawed." (*Id*. at 2.)

a. The Purported Statement by Wyatt and Cano Are Inadmissible

These purported statements by third parties Wyatt and Cano are inadmissible as a matter of law. First, Defendants failed to disclose Wyatt or Cano in their Rule 26(a) initial disclosures, and neither party so much as identified either as potentially relevant to this litigation. *See* Fed. R. Civ. P. 26(a)(1) (requiring party to identify "each individual… that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment[.]"). Because Defendants never disclosed these third parties and intend to use their statements in affirmative support of

Defendants' claims rather than "solely for impeachment," neither Wyatt nor Cano may testify at trial. Fed. R. Civ. P. 37(c)(1).

Defendants cannot show that their failures to disclose Wyatt and Cano were substantially justified or harmless. *Id.* To the contrary, McCune makes plain that Defendants have been aware of Wyatt and Cano, yet inexplicably declined to disclose them as potential witnesses on whom Defendants might rely. (*See* McCune Report at 3 (stating that defense counsel provided McCune with "names and contact information" for these and other third parties).) Nor can Defendants deny that CVT is substantially prejudiced by Defendants' nondisclosures: because fact discovery closed in January 2015, CVT has no opportunity prior to trial to determine whether these third parties made the statements attributed to them by McCune, much less explore their factual bases for any such statements. *See Villagomes v. Laboratory Corp. of America*, 2010 U.S. Dist. LEXIS 124185, *14-15 (D. Nev. Nov. 8, 2010) (finding unfair prejudice where party "had no opportunity to verify whether [third party's] opinions were accurately reported by [expert] or to explore the basis for [third party's] opinions."); *Dominguez v. Four Winds Int'l Corp*., 2009 U.S. Dist. LEXIS 43515 (S.D. Cal. May 22, 2009) (granting motion to "preclude defendants' expert from testifying as to the details of any hearsay upon which he bases his opinion").

Second, McCune's reliance on Wyatt and Cano also runs afoul of the rules against hearsay. *See* Fed. R. Evid. 801, 802. While it is sometimes permissible for experts to rely on hearsay in reports, that exception has no application where, as here, the purported declarants cannot be called at trial. The Second Circuit recently explained that:

> Although the Rules permit experts some leeway with respect to hearsay evidence, Fed. R. Evid. 703, a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony. The appropriate way to adduce factual details of specific past events is, where possible, through persons who witnessed those events. And the jobs of judging these witnesses' credibility and drawing inferences from their testimony belong to the factfinder. We therefore think the district court clearly did not abuse its discretion in declining to admit this evidence.

Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 136 (2d Cir. 2013) (citations omitted). Thus, because they may not testify at trial, McCune may not rely upon any purported statements Wyatt or Cano may or may not have made. *See Dominguez*, 2009 U.S. Dist. LEXIS 43515. Any other

outcome would permit Defendants to replace the Court's and the jury's understanding and assessment of the alleged statements made by Wyatt and Cano with their own. Because there is no way to separate those portions of McCune's analysis that depend on unsalvageable hearsay statements from those that do not, the McCune Report must be stricken in whole and Defendants precluded from introducing or relying in any way on McCune's purported opinions. *Marvel*, 726 F. 3d at 135-36 (affirming that "the reports and testimony were inadmissible."); *Dominguez*, 2009 U.S. Dist. LEXIS 43515.

b. Whatever Probative Value These Alleged Statements Have Cannot "Substantially Outweigh" the Prejudice to CVT

McCune's reliance on purported statements by Wyatt and Cano cannot satisfy Fed. R. Evid. 703, which provides that Defendants "may disclose [otherwise inadmissible facts or data] to the jury **only if** their probative value in helping the jury evaluate [McCune's] opinion **substantially outweighs** their prejudicial effect." (Emphases added.) CVT hotly disputes Defendants' suggestion that beta installations failed because of some perceived "fatal flaw" in RFID communication components of The BarMaster, and as well as whether Wyatt or Cano had a sufficient foundation for the statements Defendants allege. It is entirely possible that neither Wyatt nor Cano made the statements attributed to them, or that McCune misheard any statements they did make, or that McCune lacked the necessary context in which to understand any such statements because, as he acknowledges, "[d]ue to the lack of available information, I did not evaluate" any aspect of The BarMaster other than radio frequency transmissions. (McCune Report at 2.) CVT would have explored each issue during fact discovery had Defendants indicated that they intended to rely in any fashion on Wyatt or Cano, as well as with McCune had he been timely disclosed. But because Defendants elected to conceal each purported witness, CVT is left with no opportunity prior to trial to test these alleged statements, determine the circumstances under which they were supposedly made, or assess whether and to what extent Wyatt or Cano have knowledge sufficient to so state. *See Villagomes*, 2010 U.S. Dist. LEXIS 124185 at*14-15 (Rule 703 requires exclusion of inadmissible facts and data relied upon by expert where opponent "had no opportunity to verify whether Dr. Murry's opinions were accurately reported by Dr. Kenan or to explore the basis for Dr. Murry's

opinions."). Defendants ask CVT and this Court to take as gospel the word of a hired gun who will not testify, regarding the statements of witnesses whom Defendants never disclosed, without any opportunity for meaningful adversarial testing. Defendants' proposal must be rejected.

3. **Nothing Short of Exclusion Will Suffice to Correct Defendants' Misconduct**

Defendants may suggest that the Court might lessen the extreme prejudice to CVT by re-opening fact discovery (closed January 30, 2015) and/or extending expert discovery (scheduled to close on April 14, 2015) so as to permit CVT to depose Wyatt, Cano, and McCune as well as to submit an expert report to rebut McCune. Such a proposed remedy, however, will only *increase* the prejudice to CVT by increasing expenses and pushing trial farther and farther off. This Court has already entered several scheduling modifications in light of Defendants' delay tactics, and should not reward Defendants' sandbagging by permitting them to further avoid their day in court. *See Gerawan Farming*, 2011 U.S. Dist. LEXIS 52792 at *16 (striking untimely report rather than extending case calendar).

B. Turner's Report Must Be Stricken In Part and Corresponding Testimony Excluded

1. **Turner May Not Rely On or Introduce Any of McCune's Purported Opinions**

In seeking to rebut the Neuberger Report, Turner relies heavily on McCune's conclusion that The BarMaster is "fatally flawed." Turner argues that: (i) "Earl McCune, Ph.D., an expert in RFID technology, who reviewed the above claims and opined that the BarMaster is 'fatally flawed[;]'" (ii) "Neuberger completely avoids any discussion of the fatally flawed technology and design that prevented both the San Jose installation the [sic] Roanoke, VA installing [sic] from functioning[;]" (iii) Neuberger ignores the impact of repeated technology & design failures and their affects [sic] on the value of the Company[;]" (iv) "Neuberger also ignores the undisputed fact that the BarMaster failed in every attempted installation[;]" (v) "Neuberger utilizes a discount rate that is too low for the risks associated with a company that does not have a working product [and] fatally flawed technology[;]" and (vi) Neuberger "failed to accurately assess and analyze … technology risks[.]" (Turner Report at 7-9, 14, 17.)

Turner's parroting of McCune's findings must be rejected. First, as set forth above, the McCune Report must be stricken because it far exceeds the scope of proper rebuttal, is instead an

untimely initial report for which Defendants can show neither substantial justification nor harmlessness to CVT, and impermissibly relies on unsalvageable hearsay. As such, there is no basis in law or fact to allow Turner to rely upon or voice McCune's purported conclusions.

Second, even if some portion of McCune's Report remains—and none should—Turner must still be precluded from presenting or relying upon the same because the law does not authorize one expert to act as a mouthpiece for another, particularly where, as here, the proffered mouthpiece expert has no training or expertise whatsoever in the field of the non-testifying expert. As Judge Posner of the Seventh Circuit has explained:

> A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science. A theoretical economist, however able, would not be allowed to testify to the findings of an econometric study conducted by another economist if he lacked expertise in econometrics and the study raised questions that only an econometrician could answer.

Dura Auto. Sys., 285 F.3d at 614. In other words, the Federal Rules simply "do not permit an expert to rely upon excerpts from opinions developed by another expert for the purposes of litigation." *Imperial Credit*, 252 F. Supp. 2d at 1012-13 (surveying the law); *accord Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005) (explaining that one does not become an expert in another field simply by reviewing another expert's reports or research).

Imperial Credit is highly instructive here. In order to prevail on its affirmative securities claims, a party was "required to produce expert testimony demonstrating that SPFC's residuals were overvalued." 252 F. Supp. 2d at 1012. Instead of designating a residual valuation expert, the party "instead presented a report by an accountant (Moore) who is not and does not purport to be a residual valuation expert." *Id.* Moore's report referenced and relied upon "an expert report authored by a purported residual valuation expert [(Davidson)] retained by" that party in a prior litigation against the same adversary. *Id.* The Court concluded that Moore's reliance on another expert's opinion generated for purposes of litigation was "improper" and that "the pertinent party of the Moore Report, referring to and relying upon Davidson's opinion as to the valuation of SPFC's residuals, is therefore inadmissible." *Id.* at 1012-13. The Court explained:

> [T]here is no circumstantial guarantee of trustworthiness [with respect to the Davidson opinion]. Moore relies on excerpts from an opinion

> prepared entirely for litigation, not facts, data or opinions generated in the ordinary course of discharging a professional responsibility owed to SPFC. Unlike the persons who prepared valuations of SPFC's residual assets for purposes of financial reporting, Davidson had no business duty to report accurately. Moreover, Federal Rule of Evidence 703 contemplates that Moore would be able to "validate" the facts, data and opinions he relied upon during his testimony and be subject to cross-examination on them. Because Moore himself is not qualified to perform residual valuation, he cannot "validate" Davidson's opinions and, therefore, those opinions cannot be subjected to meaningful adversarial testing through cross-examination of Moore.

Id. at 1012 fn.5. This describes to a tee the unacceptable uncertainty Defendants' strategic elections have created here. In fact, the rationale applies with even greater force in this case: far from a situation where McCune was known to CVT through some prior litigation with Defendants regarding similar subject matter, McCune, his supposed analysis, and his purported opinions were all complete strangers to CVT until Defendants served his report, squirrelled away inside the Turner Report, on March 17, 2015.

That Defendants seek to label McCune a "technology consultant" to Turner, rather than an unrelated third party on whose opinion Turner relies, cannot excuse Defendants' sandbagging. (Turner Report at ii.) In *Goben*, for example, a defendant disclosed a rebuttal expert (Orchard, owner of Orchard Roofing Consultants) to deliver expert testimony regarding roofing defects that led to a leak that caused plaintiff to slip, fall, and suffer injury. 2014 U.S. Dist. LEXIS 81442 at *5. Orchard reviewed many documents relating to the roof in question, the reports and exhibits submitted by plaintiff's experts, and transcripts of depositions of plaintiff's experts, but did not personally inspect the roof in question. *Id*. Rather, Orchard asked his employee (Madson) to perform an inspection of the roof in issue. *Id*. Madson subsequently delivered a written report to Orchard, including 87 photographs of the roof. *Id*. Even though there was no dispute that Orchard was generally qualified to speak to roofing issues or that he was familiar with Madson's usual inspection practices, the Court granted plaintiff's motion to exclude Orchard: "Because Orchard is unable to state the principles and methods used to create the report that he relied on, testimony based on the report's contents cannot satisfy the requirements of Fed. R. Evid. 702." *Id*. at *6. So too here—short of reading what is written in McCune's report, Turner cannot state the principles and methods relied upon by McCune, much less validate whether, to what extent, or why McCune's purported findings are sound.

Moreover, because they have confirmed that McCune will not testify at trial, Defendants intend to call Turner to testify to the hearsay conclusions of McCune, based on the alleged hearsay statements of undisclosed third parties Wyatt and Cano. They may not; the Rule that bars McCune from relying on or introducing inadmissible hearsay applies doubly to Turner. *See* Fed. R. Evid. 703; *Marvel*, 726 F.3d at 136 ("a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony."). Without the alleged statements by Wyatt or Cano, McCune's analysis crumbles. And without McCune's analysis, Turner has little more to rebut Dr. Neuberger than his unwillingness to agree.

For the foregoing reasons, all portions of the Turner report which refer to or rely in any way upon the McCune Report must be stricken, and Defendants precluded from seeking to introduce in any way, whether through Turner or otherwise, the opinions set forth in the McCune Report.

2. **Turner Impermissibly Seeks to Usurp the Role of Judge and Jury**

The Turner Report is replete with improper argumentative assertions and ultimate conclusions of fact and law. Turner argues, for example, that: (i) "CVT is a company that was fraught was problems from the day it was formed and capitalized with 'IP' that [] did not exist[;]" (ii) "[f]rom the beginning, CVT had the elements of a ponzi [sic] scheme, i.e., by manufacturing the appearance of enterprise value that never existed and selling it to investors[;]" (iii) "the BarMaster failed in every attempted installation[;]" (iv) Neuberger's "opinion has no evidentiary value[;]" (v) Neuberger's prejudgment interest calculation is "moot" and need not be rebutted because "plaintiff's damages claims are so speculative, remote or conjectural that no supportably claim for damages can be made with reasonable certainty[;]" (vi) with respect to the current value of CVT, "[t]he Company itself correctly admits that this is junk science and has no relationship to 'fair market value[.]'" (Turner Report at 7, 9, 16-17.) In addition, Turner dedicates an entire section of his report to "CVT's Failure to Mitigate Alleged Damages." (*Id*. at 16.) In each such instance, Turner abandons the realm of authorized expert opinion in order to tell this Court and the jury exactly what Defendants think they should do: determine that Neuberger's "incredible" opinions are based in "junk science" and have "no evidentiary value" because CVT is a "Ponzi scheme" that "does not have a working product,

fatally flawed technology, poor management, no patents, and has never made a bonafide [sic] sale from inception in 2006 through June of 2011."

Defendants' efforts are improper and all such portions of Turner's report should be stricken. *See Glenwood Sys., LLC v. Thirugnanam*, 2012 U.S. Dist. LEXIS 71261, *21-22 (C.D. Cal. May 21, 2012) (finding expert "improperly invad[es] the province of the jury" in "opin[ing] about plaintiff's alleged failure to mitigate damages[.]") ; *see also Mukhtar*, 299 F.3d at 1063 ("an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law."); *Duncan*, 42 F.3d at 101 ("When an expert undertakes to tell the jury what result to reach, this does not aid the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's."). It is for the jury to decide what CVT was and was not, and why a promising company Dr. Neuberger values at nearly $90 million is now virtually worthless.

IV. DEFENDANTS SHOULD BE DIRECTED TO PAY CVT'S COSTS IN BRINGING THIS MOTION

In addition to "automatic and mandatory" exclusion of at least the McCune Report and all portions of the Turner Report relying on the same, Defendants' gamesmanship warrants sanctions under Rule 37(c)(1)(A). *See, e.g.*, *Yeti*, 259 F.3d at 1106 (confirming that the Court has "particularly wide latitude" to enter sanctions under Rule 37(c)). Had Defendants timely disclosed McCune as its expert, or third parties Wyatt and Cano as third parties on whom Defendants might rely at trial, this Motion might not be necessary—depositions could have been taken, spurious theories debunked, and trial closer than ever. But rather than respect the Federal Rules, Defendants elected, again, to do whatever disadvantages CVT and slows this litigation the most. Defendants' ongoing misconduct has obliged CVT, again, to needlessly expend substantial time and resources in seeking to secure Defendants' compliance with the law. Defendants should be directed pay CVT's costs and fees incurred in connection with this Motion and in deposing Defendants' improperly disclosed experts. *See, e.g.*, *AZ Holding, L.L.C. v. Frederick*, 2009 U.S. Dist. LEXIS 74515 (D. Ariz. Aug. 7, 2009).

CONCLUSION

Defendants' improper expert reports should be rejected as yet another attempt to game the judicial system to avoid the consequences of their unlawful conduct. Defendants said they would

offer affirmative technical expert testimony, but did not do so until they assured themselves that CVT would have no opportunity to respond. And they apparently still do not intend to offer actual technical testimony: they buried the affirmative McCune Report inside the rebuttal Turner Report, suppressed the identities of key third parties on whose supposed hearsay assertions McCune relies, and will not call McCune to testify to his own purported opinions. Defendants simply may not use an accountant to regurgitate the hearsay opinions of a non-testifying engineer, whose conclusions are in turn based virtually exclusively on another layer of hearsay from third parties who cannot testify at trial. Nor may their hired gun Turner substitute his own judgment for that of judge and jury. Justice requires that Defendants' chicanery be set aside so that a jury can decide this case on the merits and return a verdict with the assistance of competent and informed expert testimony that has survived adversarial testing.

Date: March 31, 2015

Respectfully submitted,

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